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No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *et al.*,

Petitioners,

v.

WILLIAM TWOMBLY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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SUMMARY OF THE ARGUMENT

I. Petitioners essentially ask the Court to change orthodox pleading standards, demarcated by the Court nearly a half-century ago in *Conley v. Gibson*, 355 U.S. 41 (1957) – and reaffirmed by the federal courts countless times since – by elevating the requirements, with regard to both persuasiveness and specificity, for claims asserting antitrust conspiracy. Even if one were to assume arguendo that there might be reasons for such a change, it would entail a foundational alteration to the Federal Rules of Civil Procedure. Rule 9(b) specifies those claims that must be pled with specificity, but makes no provision for any such heightened pleading requirement for antitrust or conspiracy claims. Rule 8(e)(1) mandates that in all other cases, allegations "shall be" simple and concise. This Court has squarely held several times in the last twenty-five years that the Federal Rules should be given their plain meaning, and that proposals to alter them should be considered, if at all, only in rulemaking or legislation.

II. Even if consideration of Petitioners' revolutionary proposal were appropriate in principle, there is no good reason for the proposed changes. The Advisory Committee on Federal Rules of Civil Procedure (the "Advisory Committee") has repeatedly considered adding categories of claims to Rule 9(b), and has repeatedly found such changes undesirable. Such a change would be particularly inappropriate in the antitrust context, where Congress intended private litigation to play a key role in vindicating vital public policies. Especially in the light of those policies, the Court has held squarely at least twice that heightened pleading standards in antitrust cases would not be appropriate. The policy basis on which Petitioners now urge that those holdings be revisited consists essentially of suppositions about a hypothesized, systemic problem of antitrust conspiracy "nuisance suits." Yet, heated rhetoric aside, Petitioners have made no showing whatsoever that any such widespread problem even exists in antitrust. Such a problem is implausible in light of this Court's decision in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), which already provides defendants with a uniquely

formidable weapon with which to discourage and defeat unfounded antitrust conspiracy claims. Moreover, identical professed problems of "nuisance suits" in other areas of law have been rejected in principle by the Court, as proposed bases for judicial supplementation of Rule 9(b) with new "heightened pleading requirements."

III. A. The controlling pleading standard holds that a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim that would entitle him to relief." *Conley*, 355 U.S. at 45-46 (emphasis added). Petitioners and their amici argue that this venerable language cannot mean what it says, and that the Court effectively changed the governing standard in *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005). To support that contention, they quote language taken in *Dura* from the Court's decision, more than thirty years ago, in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). Petitioners and their amici identify no case, in the three decades since *Blue Chip Stamps*, that has ever observed the supposed alteration in pleading standards that they now attempt to tease from the language of *Blue Chip Stamps*. In fact, both *Blue Chip Stamps* and *Dura* are conceptually consistent with *Conley*.

B. The Court's opinion in *Dura* makes clear that it was *not* intended to change governing pleading standards, citing the Court's prior decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) for the proposition that "ordinary pleading rules are not meant to impose a great burden upon a plaintiff." *Dura*, 544 U.S. at 347. This distinguishes *Dura*, in which a securities law plaintiff would not suffer any real burden from pleading facts with regard to *his own* securities transactions (as to which discovery should not be necessary in any event), from the context presented here, in which discovery is necessary in order for a plaintiff to obtain full command of facts germane to antitrust conspiracy. For this very reason, the Court has specifically recognized that dismissal prior to giving the plaintiff "ample opportunity" for discovery in antitrust conspiracy cases is especially inappropriate.

C. Aware that "heightened pleading standards" of the type they advocate have been held by the Court to be impermissible, Petitioners and their amici attempt to call what they are asking for a "context specific inquiry," and argue that the degree of necessary particularity "depends on applicable substantive law." This argument, however, is a mere retread of an identical argument made, and sensibly rejected, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167 (1993)(any "more demanding rule for pleading [one kind of claim] than for other kinds of claim" is a prohibited "heightened pleading standard").

D. Petitioners' own proposal – to apply summary judgment standards of *Matsushita* at the Rule 12(b)(6) stage – is precisely analogous to proposals made to the Court, and decisively rejected, in *Swierkiewicz*. The Solicitor General in his brief disavows any support for this proposal made by Petitioners, which is also undesirable for multiple practical reasons.

E. Instead, the Solicitor General makes his own proposal. His proposal is unclear as to whether it would include a higher persuasiveness requirement than *Conley*, because the Solicitor General includes two significantly different formulations of his proposed standard in his brief. To the extent that the Solicitor General's proposal would conflict with *Conley* by elevating persuasiveness requirements, it is unsupported by policy or precedent. The Solicitor General's arguments also would permit simple and concise allegations of fact to be ignored on the basis that they are "conclusory." In that regard his arguments are contrary not only to Rule 8(e)(1), but to *United States v. Employing Plasterers Ass'n of Chicago*, 347 U.S. 186, 188-89 (1954) ("*Employing Plasterers*"), which rejected a proposed distinction between "allegations of fact" and "mere conclusions of the pleader," and "laid to rest any lingering doubt as to the propriety of 'conclusions' in a pleading." 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* ("Wright & Miller"), § 1218 at 267 (3d ed. 2004).

F. Certain of Petitioners' amici mischaracterize the Second Circuit's decision below as though it held that "parallel conduct is enough" to state a claim of conspiracy. But in fact, the Second Circuit sensibly reasoned that a court should look to "the particular parallelism asserted," to ascertain whether it is "plausible" to allege the pertinent conspiracy. In other words, the Second Circuit merely recognized that not *all* conduct that might be called "parallel" has the same significance, and that in principle – depending on the "particular parallelism" in question – conduct that might be called parallel "can suffice," in an appropriate case, to satisfy controlling pleading standards.

G. Certain of Petitioners' other amici argue for a "plus factors pleading requirement," but at least some of their amici correctly recognize that such a rigid, formal pleading rule would be inappropriate on a motion to dismiss – a conclusion mandated by the Court's analysis in *Swierkiewicz*, 534 U.S. at 512 (a flexible evidentiary standard designed for summary judgment "should not be transposed into a rigid pleading standard").

IV. Once questions of governing pleadings standards have been clarified, it is clear that the allegations made here not only satisfy *Conley's* pleading standard, but would satisfy any pleading standard that might apply, because Respondents have made multiple simple and concise allegations of "plus factors" suggestive of an entirely plausible conspiracy. Petitioners attempt to cloud that question by insinuating that this case was brought merely to circumvent the Court's decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), but a true chronology of events shows this suggestion to be baseless. When correct rules of pleading are applied to the complaint, it is clear that the complaint states a claim. The Second Circuit's decision should therefore be affirmed.

ARGUMENT

I. Petitioners' Proposal To Reduce Discovery Burdens By Erecting Heightened Persuasiveness And Specificity Requirements For Antitrust Conspiracy Claims Would Be Inappropriately Considered On A Petition For Certiorari, And Should Be Considered, If At All, Only In Rulemaking Or Legislation.

The arguments of Petitioners and their amici rest principally on supposed concerns of public policy (*but see* Part II below), rather than on existing precedent under the Federal Rules of Civil Procedure. Indeed, even the Solicitor General's brief, while declining to support the radical proposal by Petitioners to transpose *Matsushita's* summary judgment standard to the motion to dismiss stage (Brief for the United States as Amicus Curiae Supporting Petitioners ("SG Br."), 22-23), nonetheless contends that the venerable "any set of facts" pleading standard of *Conley* should be jettisoned in antitrust conspiracy cases for ostensible reasons of public policy (*id.* at 18, 24). However, this Court has repeatedly reaffirmed the controlling "any set of facts" legal standard since the 1957 decision in *Conley*.[1] Whether such bedrock pleading rules might better be restructured from the standpoint of public policy is a question far better addressed in the context of rulemaking proceedings than in case-by-case adjudication. Even if, as Petitioners' amici tellingly find it necessary to argue, it were true that "modern complex litigation does not fit neatly into the paradigm of litigation envisioned by the drafters of the federal rules in 1938" (Brief of *Amici Curiae* Legal Scholars in Support of Petitioners ("Legal Scholars Br."), 15 n.7), the appropriate response would be to update the rules themselves through a rulemaking process, and not to open the door to *ad hoc* deviations from existing Federal Rules in individual cases.

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1. *E.g., Swierkiewicz*, 534 U.S. at 514 ("A court may dismiss a complaint only if it is clear that no relief could be granted *under any set of facts* that could be proved consistent with the allegations")(emphasis added; quoting from *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

"Over the years, commentators, judges, and Justices have shown near unanimity in extolling the virtues of the rulemaking process over the process of making 'rules' through case-by-case adjudication." K. Davis and R. Pierce, *Administrative Law Treatise*, § 6.7 at 260-61 (3d ed. 1994). Rulemaking produces higher quality rules because in the context of case-by-case adjudication, there is no way "of knowing whether the fact pattern before it applies to 100 percent, 50 percent, 10 percent, or 1 percent of superficially analogous relationships or incidents." *Id.* at 261. In the rulemaking context, unlike that of a specific case, "parties have incentives to include in their comments studies and affidavits of experts addressing such issues as (1) the frequency of occurrence of various factual patterns, (2) the likely efficacy of alternative rules in shaping conduct, (3) the cost of compliance with alternative rules, and (4) the practical problems inherent in implementing or enforcing alternative rules in varying factual contexts." *Id.* at 262. Such critical information is often absent – just as it is here (see Part II below) – in the context of case-by-case adjudication. Rulemaking also has other advantages over case-by-case adjudication that are salient here, including: (i) enhanced political accountability, and (ii) greater rulemaking clarity. *Id.* at 262-66.

Recognizing such considerations, the Court in recent years has repeatedly rejected arguments – precisely analogous to those made by Petitioners and their amici here – that heightened pleading burdens other than those contained in Rule 9(b) should be erected judicially, in order to relieve discovery burdens in particular categories of cases. In *Leatherman*, petitioners urged that pleading standards should be heightened in civil rights cases against municipalities, arguing that to apply ordinary pleading standards to such claims "would subject municipalities to expensive and time-consuming discovery in every §1983 case." 507 U.S. at 166. The Court rejected such policy arguments as a matter of principle, stating that absent amendments to the Federal Rules of Civil Procedure, "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id.* at 168-69.

The Court in *Leatherman* squarely held that a requirement for greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, *and not by judicial interpretation*." *Id.* at 168 (emphasis added).

In *Swierkiewicz*, the Court reiterated this clear holding of *Leatherman*, refusing even to consider an argument ("whatever" its "practical merits") that application of orthodox pleading standards would "burden the courts and encourage disgruntled employees to bring unsubstantiated suits." 534 U.S. at 514-15. Instead, the Court stated in *Swierkiewicz* that the Federal Rules rely "on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.* at 512. *See also, Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) (It would be inappropriate to adopt a heightened proof standard "to reduce the availability of discovery in actions that require proof of motive" because such "[q]uestions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process"); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989)("We give the Federal Rules of Civil Procedure their plain meaning, and generally with them, as with a statute, '[w]hen we find the terms . . . unambiguous, judicial inquiry is complete. . . .'"); *Gomez v. Toledo*, 446 U.S. 635, 639-40 (1980) (refusing to change the Federal Rules governing pleading by requiring the plaintiff to anticipate and plead in advance to rebut an immunity defense).

Especially after *Swierkiewicz*, every Court of Appeals has now recognized that the *only* heightened pleading requirements that are to be applied, absent amendments to the Federal Rules, are those explicitly provided for either in the text of Rule 9(b) or in legislation, such as that contained in the Private Securities Litigation Reform Act (the "PSLRA"), which is specifically directed toward such questions.[2] That

2. *See Educad[illegible] Puertorriquenos En Accion v. Hernandez*, 367 F.3d 61, 66 (1st Cir. 2004) ("overruling" prior decisions erecting heightened pleading (Cont'd)

conclusion follows inexorably from the rationale, unambiguously embraced by the Court in *Leatherman*, that in Rule 9(b), "*[e]xpressio unius est exclusio alterius.*" 507 U.S. at 168. Although some Circuits (including the Second Circuit) were slower to absorb that message from *Leatherman*, others such as the Third and Seventh Circuits had no difficulty reaching that same conclusion specifically with regard to antitrust conspiracy claims long before *Swierkiewicz*, based solely on *Leatherman*.[3] *See*, 5 Wright & Miller, § 1221 at 292-93

(Cont'd)

standards and doing so "globally," while observing that *Swierkiewicz* "has sounded the death knoll for the imposition of a heightened pleading standard except in cases in which either a federal statute or specific civil rule requires that result," and that in *Swierkiewicz* "the Court has signaled its disapproval of all heightened pleading standards except those that emanate from either congressional or Rule-based authority"); *In re Tower Air, Inc.*, 416 F.3d 229, 237-38 (3d Cir. 2005) ("a plaintiff will not be thrown out of court on a Rule 12(b)(6) motion for lack of detailed facts" and "[t]o hold otherwise would be effectively to transform Rule 12(b)(6) motions into multi-purpose summary judgment vehicles. That we will not do."); *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 347 (4th Cir. 2005)("unmeritorious claims . . . are eliminated not by motions to dismiss, but rather primarily through 'liberal discovery rules and summary judgment motions'"); *GE Capital Corp. v. Posey*, 415 F.3d 391, 396-97 (5th Cir. 2005) ("[o]ther than in the situations expressly enumerated in rule 9(b), e.g. allegations of actual fraud, plaintiffs must satisfy only the minimal requirements of rule 8(a)."); *Ruffin v. Nicely*, No. 04-5731, 2006 U.S. App. LEXIS 12392, at *18-21 (6th Cir. May 18, 2006); *Thomson v. Washington*, 362 F.3d 969, 970-71 (7th Cir. 2004); *Doe v. Cassel*, 403 F.3d 986, 989 (8th Cir. 2005); *Empress LLC v. City & County of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005); *Jackson v. Iasis Healthcare Corp.*, No. 03-4050, 2004 U.S. App. LEXIS 5356, at **6 (10th Cir. March 22, 2004); *Andrx v. Pharm., Inc. v. Elan Corp.*, 421 F.3d 1227, 1234-35 (11th Cir. 2005).

3. *E.g., Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 876 (3d Cir. 1995) ("[w]e believe that such impatience with the notice pleading embodied in the Federal Rules is foreclosed by the Supreme Court's decision in *Leatherman*. . . ."); *South Austin Coalition Cmty. Council v. SBC Communications, Inc.*, 274 F.3d 1168, 1171 (7th Cir. 2001) (rejecting as "not correct", under *Leatherman*, the proposition "that antitrust complaints must be more thorough than the normal civil complaint, the better to curtail the high cost of antitrust litigation by facilitating early disposition"); *MCM Partners, Inc. v. Andrews-Barlett & Assocs.*, 62 F.3d 967, 976 (7th Cir. 1995)

(Cont'd)

(*Swierkiewicz* was necessary because "[s]ome federal courts . . . did not generalize the principle set forth in *Leatherman*"). This Court should not now reverse direction, and lead the Courts of Appeals back toward the adoption of divergent and unpredictable pleading requirements, on an uninformed, *ad hoc* basis, based on idiosyncratic and intuitive judgments concerning comparative burdens or likely merits of entire categories of civil claims. Yet, that is precisely what Petitioners would have the Court do.

Arguments offered here by Petitioners and their amici further support deference toward rulemaking or legislation, in at least two ways. *First*, some of the arguments made by Petitioners' amici involve such far-reaching questions of policy that they would implicate very serious substantive issues, and not only pleading standards. For example, the American Petroleum Institute ("API") argues that the reason antitrust pleading standards should be changed is that "most antitrust conspiracies are uncovered by the federal antitrust enforcement agencies, and that most successful private antitrust actions alleging unlawful conspiracies simply follow on from violations initially discovered and prosecuted by the government." Brief of the American Petroleum Institute as Amicus Curiae Supporting Petitioners ("API Br."), 11-12. In this argument, API echoes one side of a debate that is actively raging in connection with the Antitrust Modernization Commission ("AMC"), concerning the appropriate relationship between public and private antitrust enforcement. (*See* www.amc.gov.) Because the question presented here involves much narrower questions of mere pleading standards, the other side of that debate has not weighed in

(Cont'd)

(Judicial attempts to apply a heightened pleading standard in antitrust cases had been "scotched" by the Supreme Court's decision in *Leatherman*, and "after *Leatherman*, an antitrust plaintiff need not include the particulars of his claim to survive a motion to dismiss."). Indeed, on the basis that Rule 8(a) applies, the Seventh Circuit has affirmatively chided plaintiffs' lawyers for doing more after *Leatherman*, writing in an antitrust case that "[w]e continue to be puzzled why lawyers insist on writing prolix complaints that can only get them into trouble." *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994) (Posner, J.).

here, and important voices on that subject, including those of antitrust enforcement agencies, have not been fully heard. API's apparent view on the subject would likely be unsupported by many, as exemplified by recognition in the Solicitor General's brief that the antitrust laws clearly provide for enforcement by private parties and that "[m]eritorious private antitrust suits provide an important check against harmful anticompetitive conduct." SG Br. 1.[4] Rulemaking or legislation would be a strongly preferable context in which to consider arguments such as those made here, in order that a full range of constructive views is considered and to enhance political accountability.

Second, the content of briefs currently before the Court dramatizes the disadvantages of litigation from the standpoint of clarity in rulemaking. As shown in Part III below, Petitioners argue for one new pleading standard, their amici argue for various different ones, and the Solicitor General argues simultaneously for two materially different standards, while not acknowledging important differences in language between the two different proposals that he advances. Petitioners and their amici largely pass like ships in the night, scarcely acknowledging that the standards that they propose have differences, much less contributing to any thorough collective dialogue about relative merits and defects of the different standards being suggested. Especially given that one change in the Federal Rules may necessitate corresponding changes in others, the narrow and contentious dialogue that accompanies a contested case is not the most conducive context in which to consider potentially far-reading changes to the

4. Unlike nearly all other amicus briefs filed by the Solicitor General in recent antitrust cases in this Court, the Solicitor General's brief in this case is not joined in by any representative of the Federal Trade Commission ("FTC"). This is not for lack of interest, as FTC representatives vigorously participated in meetings with counsel on both sides before the Solicitor General's brief was filed. To be sure, the Solicitor General has full authority to take such positions as he finds appropriate on behalf of the Executive branch, with or without concurrence from an independent regulatory agency like the FTC. Nonetheless, the apparent lack of concurrence of the FTC in the positions taken by the Solicitor General should not escape the Court's notice.

Federal Rules. This Court has judiciously declined, in *Gomez*, *Leatherman*, *Crawford-El* and *Swierkiewicz*, to start down such a path in individual cases. It should decline to do so again.

II. Even If Properly Considered Here, Petitioners' Proposal Is Ill-Advised, And Has Not Been Supported By Even A Minimal Showing That "Nuisance Suits" For Antitrust Conspiracy Are Common.

Notably, the same year when *Leatherman* was decided the Advisory Committee found that it would be "undesirable" to require additional types of cases, including antitrust cases, to be pleaded with particularly under Rule 9(b):

> The possibility of increasing the Rule 9 categories of claims that must be pleaded with particularly seemed undesirable to virtually all committee members who spoke to the question. There is a real risk that imposing specific pleading requirements for specific legal theories will be seen as a substantive decision that these theories are disfavored. . . .

Minutes of the Advisory Committee on Federal Rules of Civil Procedure, October 21, 1993, 1993 WL 761148, at *6. In making this policy judgment, the Advisory Committee was merely reaffirming views of the original framers of the Federal Rules, as made clear in *Nagler v. Admiral Corp.*, 248 F. 2d 319, 323 (2d Cir. 1957):

> When the rules were adopted there was considerable pressure for separate provisions in patent, copyright, and other allegedly special types of litigation. Such arguments did not prevail; instead there was adopted **a uniform system for all cases – one which nevertheless allows some discretion to the trial judge to require fuller disclosure in a particular case by more definite statement, F.R. 12(e), discovery and summary judgment, F.R. 26-35, 56, and pre-trial conference, F.R. 16.**

This broad policy judgment of the Advisory Committee is especially deserving of deference in antitrust cases, in view of the vital importance of antitrust law,[5] and of private litigation to its adequate enforcement.[6] Accordingly, this Court has specifically held more than once that heightened pleading requirements would be inappropriate in antitrust cases. *Radovich v. National Football League*, 352 U.S. 445, 454 (1957) ("In the face of such a policy, this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those [antitrust] laws."); *Employing Plasterers*, 347 U.S. at 189 (in antitrust cases "where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified."). The Second Circuit's opinion echoes these rulings, observing that heightened pleading requirements would be especially inappropriate "in a regime that contemplates the enforcement of antitrust laws in large measure by private litigants. . . ." Pet. App. 29a.

Even if the Advisory Committee's judgment were accorded no deference, and even if reconsideration of this Court's longstanding precedents on point might be entertained in principle, Petitioners have not shown reasons for any change. In our briefing below, we repeatedly challenged Petitioners to identify any respectable study or judicial authority that could support an assertion that antitrust cases tend to settle for small 'harassment value' sums, as Petitioners and their amici continue groundlessly to suggest as a primary

5. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972).

6. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (private actions "provide a significant supplement to the limited resources available to [DOJ] for enforcing the antitrust laws and deterring violations"); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972) (In the antitrust laws "Congress encouraged [private litigants] to serve as 'private attorneys general.').

basis for their arguments.[7] No doubt having "boiled the ocean" in an attempt to find such studies, Petitioners and their amici have cited none, because none exists.[8] As explained in Part I

7. SG Br. 25 (hypothesizing a problem of antitrust conspiracy "strike suits"); API Br. 3 ("defendants have an incentive to settle even meritless antitrust claims in order to avoid huge discovery costs.").

8. Certain amici do cite studies that they claim show "plaintiffs' lawyers use litigation to extract money from businesses that find it is cheaper and less risky to settle than to litigate." Brief of *Amici Curiae* Economists in Support of Petitioners ("Economist Br."), 12 & n.10. However, none of those studies supports suggestions that settlements reached in antitrust conspiracy cases are either: (i) frequently reached early in order to avoid attorneys' fees; or (ii) settled for less than the defendants' likely attorney fees. For example, the first article they cite is a study limited to cases brought by competitors, and deals principally with questions of standing and antitrust injury, which would be entirely beside the point with regard to horizontal conspiracy cases like this one brought by consumers. F. Snyder & T. Kauper, *Misuse of the Antitrust Laws. The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991). To the extent that any findings in the second study are relevant at all they undermine any notion that "nuisance suits" are a systemic problem in antitrust cases, by finding that the overall rates at which antitrust cases are either dismissed by the courts or litigated to some other conclusion is "higher than for other civil cases." T. Kauper & E. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared*, 74 Georgetown L. J. 1163, 1189 & n.69 (1986). The third article explicitly acknowledges that its findings are just as suggestive "that antitrust is a well-functioning system economizing on costly litigation to the parties' mutual benefit" as of anything else. S. Salop & L. White, *Economic Analysis of Private Antitrust Litigation*, 74 Georgetown L. J. 1001, 1030 (1986). API cites extensively to two law student notes (not cited as such). API Br. 7-10. *See* William H. Wagener, *Note: Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887 (2003); Corinne L. Giaccobe, *Note: Allocating Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Discovery of Electronically Stored Data*, 57 Wash. & Lee L. Rev. 257 (2000). The first note advertises its lack of objectivity by stating that it "presumes the existence of litigants willing to bring 'frivolous' antitrust claims," 78 N.Y.U. L. Rev. 1900, and does not even attempt to analyze actual outcomes of any antitrust cases. The statement in the second that API quotes (API Br. 10) is not even made in connection with antitrust claims. Obviously, neither student author has personal experience with antitrust cases on which to base the observations for which they are cited. Notably, however, the first note does acknowledge

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above, there are compelling reasons to require that any such initiative be evaluated in the rulemaking context, which lends itself much more readily to thoughtful study of such issues, rather than succumbing in a particular case to unsubstantiated "tort reform" rhetoric that has no connection to the actual workings of antitrust conspiracy cases. *Cf.*, Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in court and Jury Trial Commitments?*, 78 N.Y.U. L.Rev. 982, 1133 (June 2003) ("Unfortunately, today's rhetoric about the 'litigation explosion' [and] a 'liability crisis' . . . may be encouraging district courts and courts of appeals to rely on [*Matsushita*] to justify resorting to pretrial disposition too readily. . . .").

Just as they did in the courts below, Petitioners and their amici continue to rely primarily on authorities that have dealt with special problems attending the entirely different legal field of *securities* fraud, rather than antitrust. However, this Court has recognized, in *Blue Chip Stamps*, that securities litigation "presents a danger of vexatiousness *different in degree and kind* from that which accompanies litigation in general." 421 U.S. at 739 (emphasis added).[9] As the Second Circuit pointed out below (Pet. App. 30a & n.13), Congress took extensive action to address such unique concerns in the securities law context in 1996 and 1998, by enacting the PSLRA and the Securities Litigation Uniform Standards Act ("SLUSA"), respectively. Proposals for still further reform in the securities field also continue to percolate, based in large measure on *actual data* that their proponents claim shows

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that to implement changes in antitrust pleading standards "without congressional action or amendments to the Federal Rules of Civil Procedure appears to be foreclosed." 78 N.Y.U.L. Rev. at 1919.

9. The ABA brief quotes portions of later text from *Blue Chip Stamps*, but with an ellipsis omitting the words "in this type of case," which tends to obscure the fact that the Court there, as in the earlier quote above, was carefully *distinguishing* securities cases from all other litigation. Brief of the American Bar Ass'n as *Amicus Curiae* in Support of Neither Petitioners Nor Respondents ("ABA Br."), 12.

unique problems relating to coerced, cheap settlements in securities cases.[10]

Although thorough consideration has been given in recent years to the potential for improvements in antitrust, such consideration has yielded *nothing* that supports Petitioners' core policy hypothesis that "nuisance suits" are a systemic problem in antitrust conspiracy cases. In 2002, Congress created the AMC. (*See* www.amc.gov.) Since June 2005, the AMC has been actively engaged in an exhaustive process of analyzing and identifying potential problems in current antitrust law that might warrant legislative correction. A great deal of testimony has been given before the AMC, by some of the most distinguished antitrust practitioners and experts in the country. Even though much of that testimony relates to broad aspects of private antitrust litigation – including but not limited to a day of testimony on July 28, 2005 devoted entirely to questions of civil remedies – the testimony will be searched in vain for anything supporting Petitioners' bare assertions here, that inexpensive, early settlements for less than a defendant's likely attorneys' fees are a widespread problem in antitrust conspiracy cases.

Indeed, any such systemic problem in the antitrust conspiracy context would be implausible in light of *Matsushita*. It already provides defendants with a uniquely formidable weapon with which to crush unfounded antitrust conspiracy cases on summary judgment – significantly, a weapon for which *no counterpart exists* in the securities fraud cases to which

10. Types of data that proponents of further legislation have highlighted recently include, for example, data indicating that 70% of securities cases settled in 2004 were settled for less than $10 million, providing at least some support for the notion that many securities cases are settled for less than the attorneys' fees that it would have cost to defend them. NERA Economic Consulting, "Recent Trends in Shareholder Class Action Litigation: Bear Market Cases Bring Big Settlements" (2005). Such studies are illustrative of the types of studies that we have challenged Petitioners to identify, but that they have proven completely unable to identify, relating to private *antitrust* cases.

Petitioners seek to force an analogy.[11] Given that potential damages at stake in nationwide antitrust conspiracy cases are usually well over a hundred million dollars – and thus are far more than any likely attorneys' fees – the rational course of action for antitrust defendants generally is to defend weak claims vigorously, and to attempt to defeat them on summary judgment, rather than to succumb to cheap, early settlements of the type hypothesized by Petitioners. Those antitrust cases that settle early instead are not unfounded cases, but rather cases in which felony pleas or other merits-related developments show early on that the defendants have little hope of ultimately prevailing on summary judgment under *Matsushita*. By definition, such cases are not groundless "nuisance suits."[12]

A criticism much more often made of private antitrust cases is that they tend to be brought as "follow-on" cases to government enforcement proceedings. One of Petitioners' amici raises this criticism. API Br. 11-12. But far from showing any systemic danger of inexpensive settlements for less than probable attorneys' fees in antitrust cases, what this tends to show instead is that antitrust plaintiffs are often fearful of bringing cases, when there is no prior government action that will help to survive a summary judgment motion under *Matsushita*. This is just the opposite of the situation fancifully posited by Petitioners, in which "strike suits" supposedly are brought by antitrust plaintiffs willy-nilly in the hope of achieving a cheap, early settlement in order to avoid legal fees.

11. API quotes from *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), but all it supports, viewed in context, is greater availability of summary judgment – *i.e.*, what the Court provided eight years later in *Matsushita*.

12. To the extent that an imprudent or inexperienced plaintiffs' attorney might elect to pursue an expensive, groundless antitrust conspiracy claim on a contingent fee basis, the costs of such a claim, coupled with the inevitable ultimate dismissal of the claim on summary judgment under *Matsushita*, either discourage such a plaintiffs' attorney from ever repeating such an error, or assure that such an imprudent attorney will lose money in the process and will soon find it necessary to move on to another professional field.

Similarly, another of Petitioners' amici cites statistical data emphasizing that antitrust cases last longer than other litigation. Brief of Mastercard and Visa as *Amici Curiae* In Support of Petitioners ("MC Br."), 21 n.7. Once again, to the extent that antitrust litigation lasts longer, that *undermines* the unfounded notion that antitrust is a legal field in which meritless "strike suits" are settled early and cheaply to avoid legal fees. Thus, to the extent that Petitioners' amici even purport to make observations about how private antitrust litigation *actually functions*, the few concrete observations that they make merely undermine their unsubstantiated rhetoric concerning a supposed systemic problem of antitrust conspiracy "strike suits."

III. The Diverse Legal Standards Proposed By Petitioners And Their Amici Conflict With Bedrock Pleading Standards Under Rule 12 (B)(6).

A. A Rule 12 (b)(6) motion must be denied if it appears that "any set of facts" would justify recovery.

Nearly a half-century ago, in *Conley*, this Court made clear that it would follow "*of course, the accepted rule* that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff *can prove no set of facts* in support of his claim that would entitle him to relief." 355 U.S. at 45-46 (emphasis added). At least since that time, this "no set of facts" formulation has been a cornerstone of federal procedure, and has been reaffirmed innumerable times by the federal courts. *See* 5 Wright & Miller, § 1215 at 203-04 (*Conley's* "any set of facts" rule is supported by such a "wealth of judicial authority" that "complete citation to the case law is neither feasible nor useful."). Petitioners and their amici nonetheless essentially seek to overturn this long-established precedent. Brief for Petitioners ("Pet. Br.") 2, 27; SG Br. 18, 24; ABA Br. 2-3; Legal Scholars Br. 10-11.

In this Court's decisions, the primary case upon which Petitioners and their amici rely for their attack on *Conley's* "no set of facts" standard is *Dura*. However, the actual language of *Dura* to which they turn is merely a quote from the Court's

opinion more than thirty years ago, in *Blue Chip Stamps*, in which the Court merely identified as one goal of the pleading rules to require "a *reasonably founded hope* that the [discovery] process will reveal relevant evidence." 544 U.S. at 347 (emphasis added). The Solicitor General repeatedly adds his own phrase "sufficient to establish the plaintiff's claim," as though something of equivalent meaning followed the words "will reveal relevant evidence" in *Blue Chip Stamps* and in *Dura*. SG Br. 10, 11. However, no such words in fact appear in either *Blue Chips Stamps* or *Dura*, in which the Court plainly was not attempting to state a broad pleading standard at odds with *Conley*.

Despite this forced effort to transform language from *Blue Chip Stamps* and *Dura* into something inconsistent with *Conley*, there is no inconsistency. If it "appears beyond doubt that the plaintiff can prove no set of facts" that would support relief, that is because there is no "reasonably founded hope" that discovery will illuminate the claims. Conversely, if there is no "reasonably founded hope" of relevant discovery, that is because it appears beyond doubt "that the plaintiff can prove no set of facts" relevant to the claim. From a conceptual standpoint, both standards require only a reasonable *possibility* – and not a predominance of likelihoods, or a certainty – that the plaintiff's claim might be supported by evidence *yet to be obtained* through discovery. *See also, Swierkiewicz*, 534 U.S. at 511-12 (finding it inappropriate to require pleading of matters that will not be necessary to prove even at trial "if direct evidence of discrimination is uncovered" in discovery); Rule 11 (b)(3) (allegations made on information and belief need only be "likely to have evidentiary support *after a reasonable opportunity for further investigation or discovery*") (emphasis added).

Even apart from the logical symmetry of these legal standards, if any inconsistency between them had been intended, and if the *Blue Chip Stamps* language had been intended to change the rule of *Conley*, the courts surely would have discerned that long ago, since it has been more than three decades since the pertinent phraseology was formulated in

Blue Chip Stamps. Petitioners and their amici cannot identify even a single case in the intervening thirty years that has made note of the invisible inconsistency that they now profess to find between these governing legal standards. Any notion that such inconsistency exists also would be flatly contradicted by the fact that the "any set of facts" formulation of *Conley* has been reaffirmed repeatedly in the interim, not only by this Court but in countless other federal cases.

In decisions of the Circuit Courts, virtually the only precedent that Petitioners now continue to rely heavily upon is *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53 (1st Cir. 1999).[13] But there is no genuine inconsistency between *DM Research* and the "no set of facts" standard of *Conley*. In *DM Research*, the complaint alleged that a standard-setting organization ("National") and a non-profit college of pathologists ("the College") had conspired with one another to adopt "faulty and arbitrary standards and guidelines" for a type of water used by pathologists in medical tests. However, the First Circuit found that there was *no plausible motive* for National and the College to enter into such a conspiracy, writing that "it is highly implausible to suppose that the College or its members have any reason to 'agree' with National to adopt a faulty standard whose main effect would be to raise costs for laboratories. . . ." 170 F.3d at 56. The court took pains to point out that such an explanation of a plausible motive was *not* required to be given in the complaint, but could have been provided instead in the plaintiffs' brief or by affidavit, but that the plaintiff had proven completely unable to explain what possibly could have motivated the allegedly conspiring parties to enter into such an utterly implausible conspiracy. *Id.*

13. In their petition Petitioners also professed to rely heavily on *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357 (10th Cir. 1989) and *NHL Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005). After Respondents showed in their Brief in Opposition ("Opp. Cert.") that such reliance was misplaced (Opp. Cert. 10-11), Petitioners and their amici have dropped nearly all reference to both cases. That leaves *DM Research* as the *only* Circuit Court decision that Petitioners continue to argue directly supports their proposed legal standard for antitrust conspiracy cases on a Rule 12(b)(6) motion.

In such circumstances, to apply the phraseology of *Conley*, it would seem beyond doubt that the plaintiff could have proven "no set of facts in support of his claim that would entitle him to relief." Alternatively, to apply the language from *Blue Chip Stamps*, such circumstances would support no "reasonably founded hope that the [discovery] process will reveal" relevant evidence. The First Circuit did not use those particular phrases, stating instead that the claim would be dismissed because it was "highly implausible" and consisted of "nothing more than unlikely speculations." 170 F.3d at 56. However, nothing in those phrases is conceptually at odds with the effectively equivalent standards expressed by this Court in *Conley* and *Blue Chip Stamps*. Instead, the "plausibility" standard of *DM Research*, just like the standards in *Conley* and *Blue Chip Stamps*, again requires only a reasonable *possibility* — and not a predominance of likelihoods, or a certainty — that the plaintiff's claim might be supported by evidence *yet to be obtained* through discovery.

Indeed, it is ironic that Petitioners and their amici rely so heavily on *DM Research* in attacking the standard expressed by the Second Circuit below. The Second Circuit painstakingly incorporated the "implausibility" and "unlikely speculations" language from *DM Research* into its own articulation of the governing legal standard below. Pet. App. 20a, 22a n.6. The Second Circuit rightly perceived no inconsistency between this language and this Court's "any set of facts" phraseology in *Conley*, also explicitly citing and quoting *Conley's* controlling language. Pet. App. 11a, 25a. By contrast, Petitioners and their amici seek to distort *DM Research* by ignoring the facts of extreme implausibility with which the court in *DM Research* was actually confronted, and attempting to fashion an entirely new legal standard out of *dicta* that played no real role in the *DM Research* decision.

Furthermore, even if passing *dicta* in *DM Research* might be claimed to suggest a heightened pleading standard for antitrust conspiracy cases, such *dicta* would be contrary to *Swierkiewicz*, which was not decided until after the *DM Research* opinion. Subsequent to both *DM Research* and *Swierkiewicz*,

the First Circuit itself has relied on *Swierkiewicz*, in explicitly abrogating heightened pleading standards that did exist under its prior case law. *Educadores*, 367 F.3d at 66. Thus, the First Circuit was merely one of those Circuits that were slower fully to absorb the meaning of *Leatherman*. *See* p. 8, *supra*. Strained efforts by Petitioners and their amici to find support for their arguments in outdated dicta from *DM Research* are therefore misplaced.

Even if one could brush all existing precedent entirely aside, the Second Circuit's requirement of a "plausible" conspiracy, with alleged conspiracies that amount only to "unlikely speculations" being dismissed, makes eminent sense. Without the benefit of discovery, it will always be difficult to know in advance with a high degree of assurance, based solely on observations of public conduct and market circumstances, whether a conspiracy occurred. Instead, in circumstances genuinely suggestive of conspiracy, such considerations will show only some reasonable degree of likelihood of conspiracy. Suppose – hypothetically and using an example involving false precision – that on the alleged facts of a particular case, all objective observers could agree that the likelihood that a conspiracy occurred is 35 to 40 per cent. Clearly, further discovery into whether conspiracy actually exists in such circumstances – which is all that the denial of a Rule 12(b)(6) motion commences – would be appropriate. Since the current statutory structure unquestionably intends private antitrust cases to play a vital enforcement role, to conclude otherwise would run afoul of the Court's recognition, in *Matsushita* itself, that dangers of mistaken liability inferences "must be balanced against the desire that illegal conspiracies be identified and punished." 475 U.S. at 594. To require, instead, a preponderance of likelihoods (*i.e.*, a probability figure greater than 50%) or even more, based on such considerations as the "inexpensive determination" language of Rule 1, would be to let Rule 1's "inexpensiveness" language trump its primary mandate, that the rules be construed in such a way as to secure the "just" resolution of cases.

A more difficult question is what words best express the threshold of implausibility beyond which a line should be drawn, and beyond which sufficiently improbable allegations of conspiracy should be dismissed. Borrowing the phrase from *DM Research*, the Second Circuit expressed that threshold as one of "unlikely speculations." Although perhaps that language could be improved upon, we submit that that choice of language, which the Second Circuit's opinion carefully anchors in existing precedent, draws the line in a reasonable place. To the extent the place where the Second Circuit drew that line is reasonable and accords conceptually with the controlling "any set of facts" standard of *Conley*, as shown above, the Second Circuit's decision below should be affirmed.

B. Pleading standards are especially relaxed as to matters, like conspiracy, that are "peculiarly within the opposing party's knowledge."

It has long been held generally that pleading requirements must be *more* relaxed – not less – with regard to matters peculiarly within the opposing party's knowledge. *E.g., In re Craftmatic Sec. Litig.*, 890 F.2d 628, 645 (3d Cir. 1989). In a specific application of this principle, this Court squarely held, in *Hosp. Bldg. Co. v. Trs. Of Rex Hosp.*, 425 U.S. 738, 746 (1976), that "in antitrust cases, *where the 'the proof is largely in the hands of the alleged conspirators,'* . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." (emphasis added). *See also, Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962) (summary disposition is uniquely problematic "in complex antitrust litigation where motive and intent play leading roles, *the proof is largely in the hands of the alleged conspirators*, and hostile witnesses thicken the plot.")(emphasis added); *cf. Gomez*, 446 U.S. at 640-641 (placing substantial weight on matters being "peculiarly within the knowledge of the defendant" when allocating pleading burdens). Indeed, ABA acknowledges in its brief that policies *against* requiring a plaintiff "to provide a detailed factual underpinning for their claims" have "particular salience when the best evidence of the validity of the claim

likely lies in the hands of the defendants, as is often the case with antitrust conspiracy allegations." ABA Br. 8.

This important principle highlights the inappropriateness of the heavy reliance that Petitioners and their amici place on *Dura*. In *Dura*, the issue was whether a securities plaintiff could fairly be required to plead basic matters relating to *his own transactions*, sufficient merely to "provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." 644 U.S. at 347. Because facts relating to a plaintiffs' own securities transactions and injuries would be fully available to the plaintiff without *any need* for prior discovery, the Court held that even though "ordinary pleading rules are not meant to impose a great burden upon a plaintiff," to require some allegations identifying the plaintiff's theory of loss causation "*should not prove burdensome* for a plaintiff who has suffered an economic loss." *Id.* (emphasis added). The absence of any genuine *burden* from such a requirement was the pivotal premise of this Court's reasoning in *Dura*. By contrast, to require an antitrust plaintiff to persuade a district court through facts required to be pleaded in great detail that a conspiracy in fact occurred — the details of which would be "in the hands of the conspirators," as recognized by the Court in *Hosp. Bldg.* and *Poller* — would impose just the sort of "burdens" that the Court recognized in *Dura* must *not* be imposed on a motion to dismiss. When fairly read, *Dura* in fact undermines Petitioners' arguments, which is seemingly the way *Dura* was read by the Second Circuit. *See* Pet. App. 12a-13a (the Second Circuit citing *Dura* and quoting its pivotal "burden" language).

C. Petitioners' argument that their proposed heightened pleading standard merely reflects "complexity of the underlying substantive law" already has been rejected in principle by the Court.

Because *Leatherman* and *Swierkiewicz* have so clearly barred judicially-created "heightened pleading standards" of the type now urged by Petitioners and their amici, they attempt to do an "end-run" around *Leatherman* and *Swierkiewicz*, by arguing

that what they urge is not a "heightened pleading standard" at all, but instead only reflects that the degree of required factual specificity varies according to the complexity of the underlying substantive law.[14] However, precisely this same argument was made, and rejected by the Court, in *Leatherman*. "According to respondents," the Court wrote in *Leatherman*, "the degree of factual specificity required of a complaint by the Federal Rules of Civil Procedure *varies according to the complexity of the underlying substantive law*." 507 U.S. at 167 (emphasis added). "But examination of the Fifth Circuit's decision in this case makes it quite evident that the 'heightened pleading standard' is just what it purports to be: a more demanding rule for pleading a complaint under §1983 than for pleading other kinds of claims for relief." *Id.*

Just so here. Petitioners' sophistry notwithstanding, the legal standard that they urge to the Court would be a more demanding rule for pleading a complaint for antitrust conspiracy than for other claims. As such, it is a "heightened pleading standard" that is plainly contrary to both *Leatherman* and *Swierkiewicz*, as well as to fundamental principles that have governed for nearly half a century since *Conley*.[15] Indeed, Petitioners could not be clearer in arguing that the District Court's analysis was correct, in holding that there is a so-called "plus factors pleading requirement." Pet. App. 42a, 45a. To suggest that a "plus factors pleading requirement" would not be a "heightened pleading requirement" is a stark contradiction in terms.

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14. *E.g.*, SG Br. 7, 12 (asserting that the required degree of specificity "depends on the context and complexity of the case"); MC Br. 10-11 (it "depends on the substantive claims being asserted").

15. Evidently recognizing that this language from *Leatherman* conflicts with his argument, the Solicitor General drops a footnote purporting to argue that he is not advocating a heightened pleading standard here, but only a "context-specific inquiry." SG Br. 12 n.4. However, since he plainly advocates a broad requirement of greater particularity for antitrust conspiracy claims than other claims, this is mere word play, and a distinction without a difference.

D. Burdens of undue discovery are better managed in other ways than through *ad hoc* judicial "heightened pleading requirements."

Rule 26 of the Federal Rules of Civil Procedure, and the Manual for Complex Litigation, provide ample means of limiting discovery burdens directly, without any need for courthouse doors to be effectively barred through judicially-erected, *ad hoc* "heightened pleading requirements." Indeed, this Court has repeatedly made clear that other available tools are preferable as means of weeding out meritless claims. *See Swierkiewicz*, 534 U.S. at 512-13, 514 (the Federal Rules rely "on liberal discovery rules and summary judgment motions to define disputed facts and issues"); *Crawford-El*, 523 U.S. at 598-600; *Leatherman*, 507 U.S. at 168-69; *Conley*, 355 U.S. at 48 n.9. The Second Circuit makes the same point below. Pet. App. 29a n.12.

Importantly, procedures proposed by the Plaintiffs in this very case, after the Second Circuit's decision and before the petition for certiorari was filed, vividly illustrate the availability of practical procedures to limit undue discovery burdens. With support at least in principle from two of the Petitioners, Plaintiffs formally proposed to the trial court, in February 2006, that a process of "phased discovery" be considered, entailing a first phase of discovery limited to the existence of the alleged conspiracy and class certification, with more expansive, general discovery to follow only if the Plaintiff's class claims survive an early summary judgment motion under *Matsushita*.[16] That proposal is one illustration of various procedures that could prevent unnecessarily massive discovery burdens of the type that Petitioners' hypothesize.

Tellingly, however, while two Petitioners supported consideration of such a proposal, any such "phased discovery"

16. Joint Scheduling Conference Submission of Plaintiffs and Defendants BellSouth Corporation and Qwest Communications International, Inc., dated February 22, 2006 (Docket No. 84 in District Court). A request has been made under Rule 32(3) to lodge this document with the Court. Petitioners have stated that they have no objection.

was emphatically opposed by the two largest Petitioners.[17] A fair inference from that opposition is that the purpose of those Petitioners was *to burden the Plaintiffs* with expansive, single-phase discovery, in order to complicate and frustrate efforts on Plaintiffs' part to achieve narrowly-targeted, efficient and limited discovery into the question of conspiracy. Especially in view of the active opposition by the two largest Petitioners to this reasonable "phased discovery" proposal, their professed fears that expensive discovery calculated to bring about a "nuisance settlement" is the Plaintiffs' objective in this case should meet with due skepticism. Indeed, it is telling that while Petitioners' amici complain of a theoretical "asymmetry" between discovery burdens to plaintiffs and defendants (*e.g.*, Legal Scholars Br. at 16), in practice the largest of the Petitioners have vigorously resisted good faith efforts, on the part of Respondents and the other two Petitioners, to limit discovery burdens by using recognized and practical case management tools.

E. Petitioners' radical proposal, to apply *Matsushita* on a Rule 12 (b)(6) motion, is utterly inconsistent with the Court's precedents.

Petitioners' proposal to apply *Matsushita* at the Rule 12(b)(6) stage is precisely analogous to the proposal, rejected in *Swierkiewicz*, that the same thing be done with summary judgment standards applicable in employment discrimination cases under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Both standards are flexible summary judgment standards calculated to assist the courts in determining whether inferential cases – of conspiracy, in *Matsushita*, and of discriminatory purpose, in *Swierkiewicz* – are reasonable in the context of all the facts of a case. Neither standard needs to be satisfied at trial if direct evidence is available instead, and if the inferential case with which they deal is therefore

17. Letter from Kellogg, Huber, Hansen, Todd, Evans & Figel, LLP, dated February 22, 2006, with enclosed proposed Civil Case Management Plan (Docket No. 104 in District Court). A request has been made under Rule 32(3) to lodge this document with the Court. Again, Petitioners have no objection.

unnecessary. The respective roles of the two standards in question are so closely parallel, that the reasoning of *Swierkiewicz* is easily transposed to this case in all pertinent respects. Petitioners' argument thus could not be more clearly at odds with recent precedent.

The Solicitor General takes pains to disavow Petitioners' radical *Matsushita* proposal. SG Br. 22-23. In disavowing Petitioners' position, the Solicitor General accords with views expressed, for example, by Professor Arthur Miller. Miller, 78 N.Y.U. L. Rev. at 1073-74 (any trend toward applying *Matsushita* summary judgment standards on a motion to dismiss "not only would be unfortunate, but would be completely inconsistent with the philosophy and principles of the Federal Rules in general and the pleading rules in particular."). Moreover, other than the District Court in this case, *all* courts that have considered the issue since *Swierkiewicz*, in antitrust conspiracy cases like this one, have uniformly concluded that the principles articulated by the Court in *Swierkiewicz* and *Leatherman* foreclose the same *Matsushita* standard that that Petitioners urge be adopted in antitrust conspiracy cases. Pet. App. 26 n.9 (discussing four recent antitrust cases applying *Swierkiewicz* to foreclose application of a *Matsushita* standard at the Rule 12(b)(6) stage).

Relying on summary judgment standards from *Monsanto* and *Matsushita*, Petitioners' essential argument is that whenever "there is an evident, common-sense unilateral explanation for the conduct" alleged in a complaint, "the complaint does not state a claim of conspiracy" – apparently even if the complaint's allegations make it equally or even more plausible to suggest based on the complaint's allegations that a conspiracy occurred. Pet. Br. 30. Such an unprecedented pleading standard would make no sense at all from a policy standpoint.

Given that damages to the public from an antitrust conspiracy generally are in the hundreds of millions of dollars, while attorneys' fees even to litigate a case *fully to conclusion* are vastly less, it makes no sense to run the risk of "false

negatives" in half (or even more) of the cases in which competing inferences might reasonably be drawn from a complaint's allegations. As we have previously explained in our opposition to certiorari (at 17-18), the standard of "excluding the possibility of independent action" in *Matsushita* is calibrated to the completely different context of summary judgment after discovery, when a plaintiff has fully collected his evidence, and when the magnitude of the risks from "false positives" in a jury trial is vastly greater than the mere legal fees at stake on a motion to dismiss. To transpose *Matsushita* standards to the entirely different Rule 12(b)(6) context would unbalance the concerns expressed by the Court in *Matsushita* itself, where the Court made clear that mistaken inferences of liability "must be balanced against the desire that illegal conspiracies be identified and punished." 475 U.S. at 594. As we explained in our opposition to certiorari, such a standard also would impose unrealistic expectations on jurists, who cannot be expected to develop well-informed judgments about precise likelihoods of contrasting, reasonable inferences without the benefit of any expert testimony, or evidence from the files of those who actually work in the business at issue and are familiar with its inner workings. Opp. Cert. 16-17.

Equally importantly, from the standpoint of very basic principles, the standard urged by Petitioners would stand conventional Rule 12(b)(6) standards on their head. Since the gist of *Matsushita* is that a plaintiff on summary judgment must offer evidence that "tends to exclude the possibility" of independent conduct (475 U.S. at 588) — *i.e.*, that the defendant receives the benefit of ambiguous inferences on such a motion — to apply *Matsushita* standards on a motion to dismiss would diametrically reverse the established rule that the plaintiff gets the benefit of such inferences on a motion to dismiss. This precise point of conflict with conventional pleading standards is one of the bases for the Eleventh Circuit's refusal to accept an argument that challenged behavior was not in fact contrary to the defendants' independent self-interests, as the plaintiffs had alleged that it was, in the *NHL* case, upon which Petitioners and their amici relied heavily in their Petition. 419 F.3d at 475-76. *See* Opp. Cert. 12, 15 n.7.

F. The less radical proposal made by the Solicitor General also conflicts with the Court's precedents.

Rather than joining in the hopeless position advocated by Petitioners, the Solicitor General seeks to fashion, from the "reasonably founded hope" language of *Blue Chip Stamps* and *Dura*, a new, substituted requirement that the allegations of a complaint for antitrust conspiracy must establish "a reasonable basis for inferring that the defendants may have engaged in wrongful conduct." SG Br. 10-11, 11-12. That language is minted anew in the Solicitor General's brief, and is nowhere to be found in any prior decision of this Court or any Court of Appeals. The Solicitor General's proposal has at least two distinct aspects – relating to issues of *persuasiveness* and *specificity* – which are separately discussed below.

1. As to persuasiveness, only a reasonable *possibility* of wrongful conduct is necessary.

To the extent the Solicitor General's proposed pleading standard would require only an inference that the defendants "may have engaged" in the alleged conspiracy, and not that they "did engage" in it (SG Br. 10-11, 11-12), its requisite degree of certainty may not differ materially from the standard of *Conley*, *Blue Chip Stamps* and *Dura*, which likewise requires only a reasonable *possibility* – and *not* a predominance of likelihoods, or a certainty – that the claim will be supported by evidence yet to be uncovered through discovery.

Elsewhere in his brief, however, the Solicitor General uses significantly altered language, which seems to suggest that the bar should be raised higher. For example, significantly altering the "reasonably founded hope" language of *Dura* – which requires only a reasonable "hope" and not a reasonable "expectation" – the Solicitor General elsewhere repeatedly suggests that there must be "a reasonably grounded *expectation* that discovery *will* reveal evidence of an illegal agreement." SG Br. 8, 23 (emphasis added). To the extent that the Solicitor General's own words ("expectation" and "will") would require a higher degree of confidence than a reasonable *possibility* – the Solicitor General's words seeming to suggest a necessary

probability of conspiracy of at least 50 per cent or perhaps even more — they are plainly inconsistent both with the *Conley* standard, and with the reasonably founded "hope" language of *Blue Chip Stamps* and *Dura*.[18]

Such an "expectation of prevailing" standard also would conflict with other leading precedents. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Court made clear that it is *not* the proper function of a motion to dismiss under Rule 12(b)(6) to determine whether a plaintiff has a reasonable expectation that he "will" ultimately prevail:

> The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.

416 U.S. at 237. In *Swierkiewicz*, the Court *twice* quoted this language, reaffirming it as one of "the ordinary rules for assessing the sufficiency of a complaint." 534 U.S. 511, 515. Thus, this Court has made inescapably clear, repeatedly and recently, that any suggestion that the courts should determine on a motion to dismiss whether there is a reasonable expectation that the plaintiff "will" prevail in establishing its claim is indefensible. The Solicitor General suggests that such uninformed and summary handicapping of a plaintiff's odds of prevailing is necessary in order to prevent "costly litigation" (SG Br. 9), but this Court has made very clear, in such cases as *Scheuer*, *Leatherman* and *Swierkiewicz*, that such fears are *not* the determinants of basic pleadings standards under Rule 12(b)(6).

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18. ABA uses the different phraseology that what should be required is "a reasonable basis to believe there is an agreement." ABA Br. 3, 9. Unlike the Solicitor General, ABA does not profess to find actual support for that language in any of this Court's existing precedent. It seems unclear from ABA's choice of language whether a reasonable possibility that a conspiracy exists would be sufficient under its proposal, or whether an apparent preponderance of likelihoods (*i.e.*, a probability equal to or greater than 50 per cent) would be necessary.

2. Simple and concise factual allegations cannot properly be ignored on the basis that they are "conclusory."

The Solicitor General's proposed pleading standards plainly would change existing law, to the extent they would require that only facts alleged with great specificity in the complaint can be considered, in determining whether there is a reasonable possibility that defendants "may have engaged" in the asserted wrongful conduct. SG Br. 8, 11, 14-15, 26, 28-29 (resting his analysis heavily on an assertion that any allegations that one might call "conclusory" must be entirely "disregarded" and "put to one side," including various simple factual allegations). This proposed requirement of heightened specificity in the complaint is inconsistent not only with the Court's precedents, but with the mandate of Rule 8(e)(1) that allegations "shall" be "simple" and "concise."

In *Swierkiewicz*, the Court emphasized that Rule 8 is intended to embody only "simple requirements," analogous to those illustrated by the forms annexed to the Federal Rules of Civil Procedure, except in those cases in which Rule 9(b) explicitly requires greater specificity. 534 U.S. at 513 & n.4. Likewise, in *Leatherman*, the Court approvingly quoted from *Conley*:

> The Federal Rules of Civil Procedure *do not require a claimant to set out in detail the facts upon which he bases his claim*. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

507 U.S. at 168 (emphasis added), quoting from *Conley*, 355 U.S. 47. Thus, the essential contention of Petitioners and the Solicitor General that an antitrust conspiracy claimant must set out in detail the facts upon which he bases his claim has been rejected, definitively and repeatedly, by the Court.

Surprisingly, Petitioners make a tortured effort to contend that *Conley* holds otherwise. Entirely distorting *Conley*,

Petitioners conclude their discussion of applicable pleading standards with the pretense that *Conley* itself suggests a plaintiff must allege "'specific facts' in support of its 'general allegations of discrimination.'" Pet. Br. 28-29. But this is exactly the *opposite* of what *Conley* says. 355 U.S. at 47. That Petitioners find it necessary to stand *Conley* on its head to support their arguments merely dramatizes their indefensibility under established law.

Another purported basis in the Court's case law for the particularity requirement urged by Petitioners and their amici is *Papasan v. Allain*, 478 U.S. 265 (1986). *See* Pet. Br. 12, 18; SG Br. 14; MC Br. 11.[19] However, in *Papasan*, the allegation that the Court held could be disregarded on a motion to dismiss was an exceptionally naked "legal conclusion" – *i.e.*, that the plaintiffs' had been deprived of "a minimally adequate education." 478 U.S. at 286. What constitutes "adequate" education is entirely a matter of opinion, not fact. Because nothing was alleged that could give any meaning or factual content to that mere expression of opinion – such as that the children were "not taught to read or write" or "that they receive no instruction on even the educational basics" (*id.*) – the Court held that the mere "legal conclusion" could be disregarded. That is a far cry from any holding that simple and concise factual assertions made in accordance with Rule 8(e)(1) should be disregarded, to the extent that they are not also backstopped by still more granular allegations of fact made in greater detail. As this case well illustrates, such a *reductio ad absurdum* would rapidly lead to the discarding of nearly any "simple" and "concise" allegations in a complaint, because factual allegations, if they are to be "simple," will often necessarily be characterizable in some degree as "conclusory."[20] With such a change, vast judicial energies

19. Petitioners also profess to rely on *Anza v. Ideal Steel Supply Co.*, 126 S. Ct. 1991 (2006). Pet. Br. 18-19; SG Br. 14. However, *Anza* did not involve an insufficiency of specificity in pleading. Instead, the Court merely concluded that the plaintiff's clear theory of causation was defective as a matter of law. Thus, *Anza* has no bearing on applicable pleading standards.

20. 5 Wright & Miller, § 1218 at 265 (2004)(attempts to separately compartmentalize "ultimate facts," "evidence" and "conclusions" have

(Cont'd)

would come to be consumed by difficult determinations whether allegations are "facts" or "conclusions," while pleadings would balloon in size and impenetrability in order to avoid risks of dismissal of simple and concise but arguably "conclusory" allegations. This Court has rightly rejected reasoning like that of Petitioners in order to prevent such trends. *Employing Plasterers*, 347 U.S. at 188-89 (rejecting a proposed distinction between "allegations of fact" and "mere conclusions of the pleader" and holding that in antitrust cases "where a bona fide complaint is filed that changes every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified"); 5 Wright & Miller, § 1218 at 267 (in *Employing Plasterers* the Court "laid to rest any lingering doubt as to the propriety of 'conclusions' in a pleading.")

For example, the simple factual allegations that were identified by the Court as missing in *Papasan* — that children were not "taught to read or write" or "that they receive no instruction on even the educational basics" (478 U.S. 286), could at least as easily be dismissed as being "conclusory" as many of the simple and concise factual allegations made in the complaint in this case. Indeed, to entirely eliminate all colorably "conclusory" character from factual allegations, a plaintiff would be required to plead to at least an *evidentiary* level of detail. This Court squarely held, in *Employing Plasterers*, that no such evidentiary detail in pleading is necessary in antitrust cases.[21]

(Cont'd)
proven through lengthy experience to be "a chimera," and it is "difficult, if not impossible, to draw meaningful and consistent distinctions between or among 'evidence', 'facts' and 'conclusions'. These concepts tended to merge to form a continuum and no readily apparent dividing markers developed to separate them.").

21. *See also, Radovich*, 352 U.S. at 454 ("[T]his Court should not add requirements to burden the private litigant beyond what is specifically set forth by congress in those [antitrust] laws"). To suggest otherwise Petitioners rely upon *Davis v. Passman*, 442 U.S. 228, 238 n.15 (1979). Pet. Br. 22. However, the language that they quote out of context from *Davis* was merely included by the Court in a broader quote from a commentator, when the Court itself was merely making a different point relating to the phrase "cause of action." *Id.* at 238.

In an attempt to argue otherwise, Petitioners and their amici repeatedly recycle two snippets of language taken out of context from *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*").[22] However, the issue in *AGC* was whether the Ninth Circuit properly had read a complaint, which in fact alleged coercion merely to *include* non-union contractors in competitive bidding, as though it had alleged coercion to include *only* non-union contractors. *Id.* at 526 n.9. Because there is a vast logical gulf between the degrees of restraint that such different allegations would entail, the Court found the Ninth Circuit to have assumed "that the defendants have violated the antitrust laws in ways that have not been alleged." *Id.* at 526. That is not a holding that one must plead detailed evidence in order *further* to substantiate all "simple" and "concise" factual allegations. Instead, it was a question of *changing* the facts alleged in the complaint to something altogether different.

The other snippet from *AGC* that Petitioners and their amici repeatedly quote is its statement that "a court must retain the power to insist upon some specificity in pleading." 459 U.S. at 528 n. 17. However, the Court in that footnote was referring to the district court's powers — which had *not* been exercised there, just as they have *not* been here — to require a more definite statement pursuant to Rule 12(e). Far from supporting Petitioners' arguments on a 12(b)(6) motion, that language affirmatively undermines them, since a district court's powers under Rule 12(e) have been emphasized by the Court repeatedly as one of the most important *alternatives* to heightened pleading standards. *See* p. 25, *supra*.

The types of allegations that courts previously have held to be "bare-bones" allegations of conspiracy insufficient to satisfy Rule 8(a) present so stark a contrast with the allegations made here, that cases involving "bare bones" allegations tend

22. The Brief of the Chamber of Commerce, etc. in Support of Petitioners ("COC Br.") backstops the *AGC* snippets with *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54 (1938). *See* COC Br. 11. But proceedings in that case predated the Federal Rules of Civil Procedure.

only to confirm the sufficiency of the allegations here by way of contrast. *Cf.* Pet. Br. 21. Like the District Court, Petitioners rely heavily on *Heart Disease Research Found. v. General Motors Corp.*, 463 F.2d 98 (2d Cir. 1972). However, the complaint in that case was so inane – basing jurisdiction, for example, on "the 'general welfare' provisions of the United States Constitution" and on a non-existent "Environmental Quality Act" – that the District Court not only dismissed the complaint but sanctioned the plaintiff under Rule 11. On appeal, the Second Circuit characterized the plaintiff's nonsensical lawyering as "typical of the sloppy, scattershot matter in which this complaint was thrown together," and observed that "there is a limit to how much a court may be called upon to divine in assessing the sufficiency of the complaint before it." *Id.* at 100. To rely heavily on cases of that character as the basis for dismissing the "simple" and "concise" allegations made here, as the District court did and as Petitioners urge, is a procedural "leap to the moon." [23]

G. The supposed "parallel conduct is enough" standard that Petitioners' amici posit is a mere straw man, and any standard that hinges on whether conduct might be called "parallel" would be inappropriate.

Petitioners and their amici repeatedly mischaracterize the Second Circuit's opinion below as though it held that "parallel

23. *See also, Tal v. Hogan*, 453 F.3d 1244, 1261 (10th Cir. 2006) ("bid-rigging" phrase amid assertions that a development proposal was "collusive, fabricated, and non-competitive" was "nothing more than claiming that the defendants violated 'the antitrust laws'" and was mere "buzz-words," when one of the alleged conspirators "had no economic interest" that could have motivated her to collude); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213 (4th Cir. 1994) (claim asserted only that "a single real estate foreclosure" was result of "conspiracy" and thus unlawful); *Lombard's Inc. v. Prince Mfg., Inc.*, 753 F.2d 974 (11th Cir. 1985) (resale price maintenance claim did not identify conspirators and only fact alleged was one persons' refusal to sell to plaintiff). Tellingly, *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648 (1999), upon which amici curiae Legal Scholars also rely (at 14), "cannot be considered authoritative after *Leatherman*." *Hammes*, 33 F.3d at 781.

conduct" will *always* be enough to sustain a complaint for horizontal antitrust conspiracy. However, since that is not what the Second Circuit in fact said, most of the broad arguments made by several of Petitioners' amici are simply misdirected. *E.g.*, Economists' Br. (attacking in the abstract a supposed "parallel conduct is enough" standard – on grounds that traditional parallel conduct, such as mere pricing "in similar ways" over time, would not support a plausible inference of conspiracy – but not purporting to opine on anything even resembling the *particular parallelism*, asserted here, of non-competition by ILECs with one another as CLECs). Indeed, the amicus curiae economists provide a long list of wholly abstract types of conduct that might be called "parallel" (Economists Br. 15), as though the Second Circuit had held that *any* allegation that such "parallel" conduct occurred would *necessarily* satisfy *Conley's* legal standard. But that utterly mischaracterizes the Second Circuit's opinion.

As to whether *any* allegation of parallel conduct might be sufficient to defeat a motion to dismiss, the Second Circuit in fact *rejected* any hard-and-fast rule, recognizing that not all conduct that might be argued to be "parallel" *ipso facto* has the same probative value. Instead of reasoning rigidly based on whether conduct might be said to be "parallel" or not, the Second Circuit sensibly held that courts should look to "*the particular parallelism asserted*," to determine whether it "plausibly" may be the result of a conspiracy. Pet. App. 25a (emphasis added). The Second Circuit's opinion does not hold that parallel conduct *always* will suffice to state a plausible claim of conspiracy, but only that in view of the "particular parallelism asserted" it "*can suffice*" to do so. *Id.* (emphasis added).[24] In other words, the mere fact that alleged conduct by the defendants might reasonably be characterized as "parallel" does not necessarily mean as a matter of law that it *cannot* be suggestive of a plausible conspiracy.

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24. Petitioners and their amici recast this language as though it held that any parallelism necessarily "does suffice" rather than merely that parallel conduct "can suffice," but the Second Circuit's opinion never says that.

This is necessarily so, since it is easy to conceive of conduct that could be called "parallel" but that nonetheless *would* be strongly suggestive of conspiracy. For example, complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason, obviously could be highly suggestive of conspiracy. The fact that such conduct could be called "parallel" does not *ipso facto* mean that it is *not* suggestive of conspiracy.

Far from adopting a wooden "parallel conduct is enough" standard like that posited by Petitioners and their amici, the Second Circuit's opinion unambiguously requires that an alleged conspiracy must be a "plausible" one, and that it must be accompanied by allegations of fact putting the defendants on fair notice of the conspiracy's nature and asserted effects. In other words, the alleged factual predicate "does need to include conspiracy among the realm of plausible possibilities." *Id.* at 19a, 25a. "If a pleaded conspiracy is implausible on the basis of the facts as pleaded – if the allegations amount to no more than 'unlikely speculations' – the complaint will be dismissed." *Id.* at 20a. In formulating this standard, the Second Circuit borrowed much of its phraseology directly from the First Circuit's decision in *DM Research*, which was the Circuit Court decision that Petitioners themselves most heavily relied upon below (just as they continue to do here). As shown in Part III.A above, however, that language from *DM Research* is consistent conceptually with this Court's phraseology in *Conley*, *Blue Chip Stamps* and *Dura*.

Many cases involving asserted "parallel conduct" are likely to fail under the Second Circuit's standard. In some cases, just as in *DM Research*, there will be no "plausible" motive for defendants to have conspired to engage in the type of conduct alleged. In others, for any of a variety of reasons (such as small collective market shares of the alleged conspirators, or a clear absence of opportunities to conspire), aspects of the market's structure may make the notion of a conspiracy of the type alleged inherently "implausible." Timing considerations unique to a case also may make the

asserted conspiracy "implausible." For example, after its decision below, the Second Circuit held in another case that the requirement of "plausible" factual allegations to support a conspiracy allegation was *not* satisfied, in light of the length of time that passed between the time of the alleged conspiracy and the time of actions allegedly taken in furtherance of it. *In re Tamoxifen Citrate Antitrust Litig.*, 429 F.3d 370, 402 (2d Cir. 2005)(affirming dismissal under Rule 12(b)(6) because "the pleaded conspiracy seems to us to be 'implausible.'"). *See also, Altieri v. Albany Public Library*, 2006 U.S. App. LEXIS 2725 at **4-5 (2d Cir. Feb. 1, 2006).

Although one cannot identify in advance all fact patterns that might render an alleged conspiracy "implausible," the type of fact-sensitive reasoning exemplified by *Tamoxifen* illustrates the undesirability of a rigid rule based on whether conduct is "parallel" or not. A more flexible and sensible pleading standard – like those adopted by the Second Circuit below and expressed by this Court in *Conley* and *Blue Chip Stamps* – rightly turns instead on whether there appears to be a reasonable *possibility* (or a "reasonably founded hope") that discovery may unearth evidence of the alleged conspiracy.

H. To adopt any standard that hinges on whether "plus factors" have been pleaded also would be inappropriate.

Some of Petitioners' amici advocate a pleading standard for antitrust conspiracy cases that would make sufficiency of the complaint depend on whether "plus factors" have been pleaded. However, any such rigid requirement would foster confusion and not enlightenment. Essentially this same point is made by the Court in *Swierkiewicz*, with regard to the requirements of a "prima facie case" of employment discrimination under *McDonnell Douglas*. As the Court stated in *Swierkiewicz*, the requirements of such a prima facie case "can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic'." 534 U.S. at 512. "Given that the prima facie case operates as a flexible evidentiary standard," the Court in *Swierkiewicz* wrote, "it should not be

transposed into a rigid pleading standard for discrimination cases." *Id.*

In the same way here, to transpose "plus factor" summary judgment analysis woodenly into a rigid Rule 12 (b)(6) pleading standard turning on whether "plus factors" have been alleged would be unwise. Interestingly, some of Petitioners' amici agree with us in this respect.[25] Instead, the touchstone for the governing legal standard should be what degree of evident probability should be required that actionable conduct occurred. As shown in Part III.A above, under established case law, a reasonable possibility should suffice, and neither a predominance of probabilities nor a certainty should be required. The Second Circuit therefore rightly eschewed any rigid "plus factors pleading requirement" – even while correctly recognizing that the plaintiffs in this particular case have clearly pleaded "plus factors." Pet. App. 32a n.15.

IV. The Allegations In This Case Satisfy Rule 12(b)(6).

A. The allegations made here amply satisfy *Conley*.

The complaint in this case not only satisfies Rule 8(a)'s requirements of a "short and plain" statement of the claim consisting of "simple" and "concise" allegations pursuant to Rule 8(e)(1), but goes far beyond that, including numerous "plus factors." We exhaustively described the specific allegations in our opposition to certiorari, and will not repeat that full description here. *See* Opp. Cert. 19-28. The Second Circuit explicitly found that the complaint's allegations were sufficient, in a detailed and well-reasoned analysis. Pet. App. 4a-7a, 30a-33a. Indeed, even the Solicitor General, while

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25. *See* Legal Scholars Br. 25:

> Amici recommend this Court not simply adopt the doctrine of 'plus factors' from the courts of appeals. Plus factors are a vague amalgam of matters, all of which are relevant in the Evidence Rule 401 sense to the question of conspiracy, but which often fail to rise to the level of 'tending to exclude the possibility' of unilateral conduct.

advocating a higher legal standard than the one that controls under existing law (*see* Part III.F.1 above), repeatedly states that it is a "close question" whether this case would satisfy even his own proposed *higher* legal standard. SG Br. 8, 26. However, under the established principle that a complaint should be construed "liberally in accordance with the mandate in Rule 8(f) and the general spirit of the federal rules," 5 Wright & Miller, §1215 at 195 (citing cases), such "close questions" should be resolved in a plaintiff's favor, and not in favor of the defendants.

B. The arguments being offered to attack Respondents' allegations are themselves seriously flawed.

Nothing could better demonstrate the degree to which Plaintiffs' allegations actually satisfy controlling legal standards than the extraordinary contortions that the District Court, Petitioners and their amici have found it necessary to resort to, in order to attempt to argue otherwise.

1. This case was not begun to circumvent the Court's decision in *Trinko*.

Attempting to prejudice the Court's analysis on the merits, Petitioners present an anachronistic account of the events that led to this case, transparently attempting to insinuate that this case was commenced *after* this Court's decision in *Trinko*, in order to circumvent the Court's holding in *Trinko* with regard to monopolization claims under Section 2 of the Sherman Act. Pet. Br. 5-6. This gambit has evidently carried the day with Petitioners' amici, who show manifest confusion about the actual timing of events.[26] In fact, however, the horizontal conspiracy claims asserted in this case were first filed on December 23, 2002, well over a year *before* the Court decided *Trinko*. JA-1. Indeed, even the District Court's opinion in this

26. COC Br. 4 (asserting that "Plaintiffs abandoned their monopolization claim . . . then turned to" a Section 1 claim); Legal Scholars Br. at 4 ("The claims became claims of conspiracy not to compete after this Court held, in *Trinko*," *etc.*).

case, dated October 8, 2003 (JA-4), preceded the Court's *Trinko* decision by more than three months. The Court did not even grant certiorari in *Trinko* until March 10, 2003 – nearly four months *after* the first complaint was filed in this case for conspiracy under Section 1 of the Sherman Act. It was by no means clear before certiorari was granted in *Trinko* that it would be granted, much less how this Court ultimately might rule in the case. Any notion that the horizontal conspiracy claims in this case were conceived as some sort of device to circumvent *Trinko* thus ascribes gifts of prophesy to Respondents and their counsel.

Nor do the events that led to this case suggest any impropriety. Counsel for the Plaintiffs in this case include counsel who represented the plaintiffs in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), in which the Seventh Circuit held that failure by an ILEC to comply with the requirements of the Telecommunications Act could not provide the basis for monopolization claims against the ILEC, under Section 2 of the Sherman Act. After *Goldwasser*, Respondents' counsel were approached in 2000 or 2001 by CLEC competitors of Petitioners, to consult about possibilities of representing CLECs in litigation against certain of the Petitioners. Those discussions led Respondents' counsel to develop further knowledge, in addition to that developed in *Goldwasser*, concerning allegedly wrongful conduct by Petitioners. Ultimately, Respondents' counsel chose not to undertake the representation of those CLECs in litigation against the Petitioners based upon such conduct.

In 2002, however, the Second Circuit issued its decision in *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002), which disagreed with *Goldwasser*, and strongly supported a view that viable consumer class actions could be brought against Petitioners for monopolization under Section 2 of the Sherman Act, based on the "essential facilities" doctrine and otherwise. In the wake of the Second Circuit's *Trinko* decision, and with knowledge of relevant events that had been developed in *Goldwasser* and through discussions with CLECs, Respondents' counsel represented class action

plaintiffs who brought claims under Section 2 of the Sherman Act against each of Verizon, SBC and BellSouth, in federal courts in New York, Connecticut and Atlanta, respectively, during the late summer and fall of 2002. In their complaints in those cases, the plaintiffs did not assert claims for horizontal conspiracy under Section 1 of the Sherman Act, because no such claims had been at issue in *Goldwasser* or *Trinko*.

After the commencement of those cases, Respondents' counsel engaged in further investigation with regard to the possibility of additional antitrust claims on behalf of consumer class plaintiffs against the Petitioners. During the fall of 2002 – and especially after the Section 2 cases against Petitioners had been commenced – Respondents' counsel were approached by certain persons who discussed with counsel whether conduct that was the subject of the pending Section 2 monopolization cases may have been undertaken by Petitioners in unlawful collusion with one another. Counsel for Respondents met with such persons during late 2002, and began to consider and investigate whether such suggestions might properly provide a basis for additional legal claims for horizontal conspiracy to restrain competition, in violation of Section 1 of the Sherman Act.

Those investigations were unexpectedly brought to a head on or about December 19, 2002, when a telecommunications industry acquaintance of Respondents' counsel provided a copy of a letter written by Congressmen Conyers and Lofgren to U.S. Attorney General John Ashcroft, dated December 18, 2002, in which they demanded that an investigation be commenced into appearances that unlawful collusion of the type alleged in this case may have occurred. *See* JA-46-49. That letter contained significant factual detail, and identified various factors reasonably supporting the likelihood of such collusion. *Id.* Coupled with the results of their investigations in prior months, Respondents' counsel concluded that the detailed analysis offered in that letter provided a sufficient basis for the commencement of a claim against Petitioners under Section 1 of the Sherman Act. It is no accident that the original complaint in this case was filed four days later, on

December 23, 2002. Thus, the case obviously was not commenced to "circumvent *Trinko*." Instead, the case followed the emergence of grounds to believe that Petitioners' conduct may very well be the result of unlawful collusion.

2. The District Court's analysis failed to accept Respondents' allegations as true.

The District Court erred below, by explicitly applying a "plus factors pleading requirement" that it took out of its appropriate context from the summary judgment standards of *Matsushita*. Pet. App. 41a-42a. As the Second Circuit pointed out in its opinion, even if such a "plus factors pleading requirement" existed – although it does not – the allegations in the complaint here would satisfy it, since plaintiffs simply and concisely allege that the defendants engaged in conduct that would have been against their self-interest in the absence of a conspiracy. Pet. App. 32a n.15. The District Court concluded otherwise, but did so only by violating the basic principle, reaffirmed by the Court as recently as 2006, that the courts must "accept as true the factual allegations in" a complaint. *Anza*, 126 S. Ct. at 1994 (citing *Leatherman*).[27] Thus, as the centerpiece of its factual analysis, the District Court labeled certain of Plaintiffs' key factual allegations as "assumptions," even though they are really simple and concise factual allegations.[28]

The Complaint specifically alleges – citing and quoting supporting industry commentary – that the ILEC in an adjacent territory is "best situated" to compete in its neighbors'

27. *Accord, Swierkiewicz*, 534 U.S. 508 n.1; *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).

28. *See* Pet. App. 51a-53a (repeatedly characterizing explicit factual allegations by Plaintiffs about the functioning the relevant marketplace as "assumptions" rather than facts (Pet. App. 51a-52a), and then proceeding to reject them on the basis that they are "undermined" by other considerations having scant support (*id.*), from which the District court then derived "implications" directly contrary to Plaintiffs' factual allegations (Pet. App. 52a-53a)).

service areas. JA-20, ¶ 38. In the same vein, it alleges as to "surrounded territories" – which are detailed pictorially in color illustrations attached to the complaint – that "the service of such surrounded territories presents the RBOC serving surrounding territories with an especially attractive business opportunity," and that in competing as a CLEC in such neighboring territories, an ILEC acting as a CLEC would have "substantial competitive advantages." JA-21-22, ¶¶ 40-41. The District Court swept away these key factual allegations with a string of *ipse dixits*, asserting that "ILECs who attempt to become CLECs in another ILEC's territory have little competitive advantage over other CLECs" (Pet. App. 52a), that "an ILEC acting as a CLEC is in substantially the same position, and must undertake the same economic calculus, as any other CLEC" (Pet. App. 53a), and that "the ILEC-as-CLEC is not different from any other CLEC with respect to its entry into new markets." Pet. App. 54a. Not only are these central premises of the District Court's opinion directly contrary to simple and concise factual allegations made in the complaint – as well as being dubious at best as a matter of common sense – but the District Court's opinion cites no evidence or authority to support them.

Plaintiffs' allegations that adjacent ILECs are "best situated" to compete as CLECs, and that such competition would have been "an especially attractive business opportunity" for which they would have had "substantial competitive advantages" in the absence of a conspiracy, cannot reasonably be dismissed as being wholly "implausible," particularly in light of: (i) Defendants' own complaints to Congress that the rates a CLEC is required to pay an ILEC to least its network components are below-cost and unfair (JA-21, ¶ 39; *see also* Pet. App. 5a-6a); (ii) explicitly pleaded expectations of Congress at the time when the Telecommunications Act was passed, that the ILECs would aggressively compete with one another as CLECs (JA-20, ¶ 38); (iii) "public pledges" given by Petitioners, at the time of the 1996 Act, "that they would seek to advance the goals of competition by entering local telecommunications markets outside their region" (JA-47); and (iv) demonstrated

investment expectations of sophisticated CLEC investors, who invested "tens of billions of dollars" in the belief that competition as a CLEC was a potentially viable business model in the wake of the Telecommunications Act. JA-65. Nonetheless, based on a sweeping and unsupported assertion that the business of a CLEC is "entirely different" from that of an ILEC,[29] the District Court effectively rejected Plaintiff's clear allegations that competition as CLECs would have presented Petitioners with "an especially attractive business opportunity" in the absence of the alleged conspiracy. In doing so, the District Court plainly violated the established rule that simple and concise factual allegations made in a complaint must be treated as true.[30]

29. The District Court's broad assertion that the businesses of ILECs and CLECs are "entirely different" not only runs contrary to factors (ii) and (iii) in the text above, but is plainly incorrect, in light of facts such as that ILECs and CLECs compete with one another for the very same local telephone service customers, and that the physical infrastructures used to serve and maintain their respective customer bases are technologically very similar and interdependent. With regard to advertising and service (from the customer standpoint), as well as to technical equipment (from an operational standpoint) and manpower and expertise (from a personnel standpoint), it is starkly obvious that ILECs surrounding relatively small "islands" of service served by other ILECs would have numerous competitive advantages in competing as CLECs in those "islands." The District Court's contrary conclusion that for ILECs not to compete as CLECs is no different from a decision not "to enter some other line of business" (Pet. App. 57a) is simplistic and defies common business sense.

30. Petitioners and their amici rely on a recent supplement to the Hovenkamp antitrust treatise, in which Professor Hovenkamp expresses support for essentially the same conceptual error made by the District Court. Pet. Br. 14-15; SG Br. 21, 28. However, not only is there no indication that Professor Hovenkamp gave any consideration to factors such as those summarized above, but Professor Hovenkamp takes pains to caution the reader, at the outset of his discussion of the Second Circuit's opinion below, that he "was consulted by a defendant subsequent to the Second Circuit's decision." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 307d, at 150 n.1 (Supp. 2006).

3. Petitioners and their amici fail to construe the complaint liberally.

Petitioners and their amici try a different approach from that of the District Court, drawing hair-splitting distinctions between Plaintiffs' allegations and supposedly "different" allegations they assert Plaintiffs *could have* made to state a claim. The cornerstone of Petitioners' argument consists of a distinction between Plaintiff's most central allegation of fact – that competition by the ILECs as CLECs in their contiguous territories was "an especially attractive business opportunity" as to which adjoining ILECs would have "substantial competitive advantages" – and the supposedly "different" allegation that such nearby-entry opportunities were "more attractive than other business opportunities." Pet. Br. 35; SG Br. 28, 29. Even if a vanishingly microscopic distinction of this sort between "especially attractive opportunities" and "more attractive" opportunities made sense – and it does not – the near-invisible nature of any such distinction would be more than offset by the basic pleading principle that pleadings "are to be construed liberally in accordance with the mandate in Rule 8(f) and the general spirit of the federal rules." 5 Wright & Miller, §1215 at 195 (citing cases).[31] To allow such insubstantial "distinctions" to defeat a claim would run afoul of *Conley's* admonition that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits," 355 U.S. at 48, while also conflicting with Rule 8(e)'s provision that "[n]o technical forms of pleading or motions are required."

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31. Indeed, by effectively conceding that to allege that competition as a CLEC would have been "more attractive" *would have been adequate* to plead the "plus factor" of action against self-interest, Petitioners merely confirm the correctness of the Second Circuit's conclusion that a potentially persuasive "plus factor" *has been* alleged through simple and concise allegations that competition as a CLEC was an "especially attractive" opportunity.

4. Petitioners and their amici ignore simple and concise factual allegations as "conclusory."

Petitioners and their amici also argue that although "the complaint does assert that" Petitioners' non-competition in one another's territories "would be 'anomalous in the absence of an agreement . . . the complaint offers nothing but conclusory assertions in support of that statement." SG Br. 8. However, the pertinent allegations in the complaint clearly qualify under Rule 8(e)(1) as "simple" and "concise," including detailed, color maps of the Petitioners' configurations of contiguous territories (JA-37, 38), and specific factual assertions that competition by each of the Petitioners as CLECs in such contiguous territories would have been "an especially attractive business opportunity." JA-21, ¶ 40. The complaint alleges that competition by each of the Petitioners as CLECs in surrounded territories of the other Petitioners would have given the competing Petitioners "substantial competitive advantages," such that "[i]n the absence of an agreement not to compete, it is especially unlikely that there would have been no efforts by surrounding and dominant RBOCs to compete in such surrounded territories." JA-22, ¶ 41. To dismiss such simple and concise allegations wholesale as the Solicitor General does, on grounds that they should be entirely ignored as "conclusory" because they do not exhaustively explain *why* they are true – or because they do not rebut in advance all arguments one might conceive to the contrary – would be to open Pandora's box to a mind-numbingly detailed, evidentiary level of pleading in future antitrust conspiracy cases. The inevitable consequence would be a repeat of unfortunate past judicial experiences described in *Nagler*, involving "vast increases in verbiage" that "delayed the cause and exhausted the time of judges." 248 F.2d at 325.[32] Such a return to "technical forms" of pleading for conspiracy cases would be

32. To the extent that the Petitioners' arguments would require a plaintiff to anticipate and rebut affirmative defenses in his complaint, such arguments also are squarely contrary to *Gomez*. *See United States v. Northern Trust Co.*, 372 F.3d 886, 888 (7th Cir. 2004)("[C]omplaints need not anticipate and attempt to plead around defenses.").

undesirable, and would be incorrect under Rule 8(e)(1) as well as other well-established law.

5. Petitioners ignore the teaching of *Continental Ore*.

The defects in analysis of the complaint's allegations that are discussed in Parts 2 through 4 above relate to the first element of the conspiracy that Respondents allege, which is a conspiracy not to compete *with one another* as CLECs. Respondents also allege, however, that Petitioners engaged in parallel behavior calculated to prevent *other* CLECs from competing successfully. As Petitioners and their amici concede, Respondents allege at least two conventional "plus factors" with regard to this second element of the conspiracy specifically. SG Br. 27. Especially in light of those allegations, not only is the second element of the alleged conspiracy independently "plausible," but even if there were a "plus factors pleading requirement," it would be satisfied independently in connection with this second element.

Equally importantly, this Court held, in *Cont'l Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 699 (1962), that in analyzing an alleged antitrust conspiracy, a court must *not* "tightly compartmentaliz[e] the various factual components [of an alleged conspiracy] and wip[e] the slate clean after scrutiny of each." We have consistently cited this principle from *Continental Ore* in the briefing below. Nevertheless, completely ignoring *Continental Ore*, the District Court did exactly what *Continental Ore* forbids, compartmentalizing this second element of the alleged conspiracy separately, analyzing it first as though it were the core of the conspiracy claim, and "wiping the slate clean" of it before moving on to the primary element of the conspiracy, which is the alleged agreement not to compete *with one another* as CLECs. Pet. App. 48a-58a.

Petitioners and their amici do the same thing in their briefs to this Court, continuing completely to ignore *Continental Ore*. Pet. Br. 30-37; SG Br. 26-28. By doing so, they turn a blind eye to the mutually reinforcing aspects of the two prongs of the alleged conspiracy. Petitioners and their amici employ this

strategy in order to argue that the alleged success of Petitioners' efforts to keep other CLECs out provides an "alternative explanation" (under *Matsushita*) for the ILECs' non-competition with one another as CLECs – ignoring, meanwhile, Respondents' entirely plausible allegation that a false appearance of unattractiveness of CLEC competition was one of the Petitioners' motives for conspiring to keep other CLECs out in the first place. JA-26-27, ¶ 50.

Under *Continental Ore*, this "divide and conquer" approach to conspiracy allegations is legally impermissible. Instead, the first and primary element of the alleged conspiracy – the conspiracy not to compete *with one another* as CLECs – should be analyzed first, as was done by the Second Circuit. If that element satisfies the requirements of Rule 12(b)(6) – as it clearly must under any legal standard in light of Respondents' simple and concise allegations of "action against self-interest" – then there is no need or occasion separately to evaluate the secondary aspect of the alleged mutually-reinforcing conspiracy. The Second Circuit rightly recognized this, not separately analyzing the conspiracy's second element, after the first and primary element of the conspiracy had been found sufficient to state a claim. In that respect as well the Second Circuit's decision is legally correct, under *Continental Ore*.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit should be affirmed.

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Respectfully submitted,

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